INDEX

A. The history and present application of the concurrent sentence doctrine reveal it as a principle of judicial efficiency which permits judges to avoid decision of issues which have no impact on the rights of any party ..... Page 3

B. Since failure to review all of several concurrent sentences only rarely would condone collateral legal consequences, the burden may fairly be placed on an appellant to show that the concurrent sentence doctrine should not be applied to his appeal 8

1. In the ordinary case, individual counts on which concurrent sentences are imposed carry no individual consequences which might require the validity of conviction on each count to be tested 8

2. Appellants should bear the burden of showing the circumstances, if any, which bar application of the concurrent sentence doctrine to their appeals 18

C. An abandonment of the concurrent sentence doctrine would unnecessarily burden the administration of justice 20

CITATIONS

Cases:

Abrams v. *United States*, 250 U.S. 616 4

Aron v. *United States*, 382 F. 2d 965 6

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 19

Baker v. *United States*, 401 F. 2d 958 6

Ballew v. *United States*, 160 U.S. 187 8

Banzer v. *United States*, 367 F. 2d 865, certiorari denied, 385 U.S. 1009 22

Barenblatt v. *United States*, 360 U.S. 109 4

Braden v. *United States*, 365 U.S. 431 ..... 5, 6

Brooks v. *United States*, 267 U.S. 432 5

Brown v. *United States*, 256 F. 2d 151 13

Carafas v. *LaVallee*, 391 U.S. 234 ..... 8, 9

Chavez v. *United States*, 387 F. 2d 937 7

Claassen v. *United States*, 142 U.S. 140 ..... 3, 4

Clark v. *United States*, 267 F. 2d 99 ..... 7, 13

Clifton v. *United States*, 4 How. 242 3

Cases—Continued

	Page
Davis v. *United States*, 385 F. 2d 919	6
Debs v. *United States*, 249 U.S. 211	5
Edwards v. *United States*, 312 U.S. 473	5
Emspak v. *United States*, 349 U.S. 190	4
Evans v. *United States*, 153 U.S. 608	4
Evans v. *United States*, 153 U.S. 584	4
Fabianich v. *United States*, 302 F. 2d 904, certiorari denied, 371 U.S. 816	6
Ferrari v. *United States*, 169 F. 2d 353	17
Fiswick v. *United States*, 329 U.S. 211	9
Flast v. *Cohen*, 392 U.S. 83	19
Galbraith v. *United States*, 387 F. 2d 617	6
Garcia v. *United States*, 373 F. 2d 806	6
Ginsberg v. *New York*, 390 U.S. 629	8, 9
Gonzalez v. *United States*, 224 F. 2d 431, certiorari denied, 356 U.S. 913	12
Goode v. *United States*, 159 U.S. 663	4
Gorin v. *United States*, 312 U.S. 19	5
Greene v. *United States*, 358 U.S. 326	5, 6
Head v. *United States*, 346 F. 2d 194	20
Hirabayashi v. *United States*, 320 U.S. 81	5, 7
Jacobs v. *United States*, 388 U.S. 431	9
Jacobs v. *United States*, 395 F. 2d 469	6
Lanza v. *New York*, 370 U.S. 139	5
Lawn v. *United States*, 355 U.S. 339	5
Locke v. *United States*, 7 Cranch. 339	3
Morgan v. *United States*, 98 F. 2d 473, certiorari denied, 305 U.S. 648	20
Nilva v. *United States*, 352 U.S. 385	8
Palmer v. *Hoffmann*, 318 U.S. 109	20
Pasterchik v. *United States*, 400 F. 2d 696	6
Peyton v. *Rowe*, 391 U.S. 54	8, 9, 10
Pierce v. *United States*, 252 U.S. 239	5, 18
Pinkerton v. *United States*, 328 U.S. 640	4, 5
Putnam v. *United States*, 162 U.S. 687	8
Robinson v. *United States*, 30 F. 2d 25	7
Roviaro v. *United States*, 353 U.S. 53	5, 6
Sacher v. *United States*, 356 U.S. 576	4
Saville v. *United States*, 400 F. 2d 397, certiorari pending, No. 1045 Misc., this Term	6, 7
Sciberras v. *United States*, 404 F. 2d 247	6

Cases—Continued

	Page
Sibron v. *New York*, 392 U.S. 40	3, 8, 9, 10, 11, 18
Sinclair v. *United States*, 279 U.S. 263	4
Smith v. *United States*, 335 F. 2d 270	6, 7
Smith v. *United States*, 403 F. 2d 689	6
Snyder v. *United States*, 112 U.S. 216	3
Spencer v. *United States*, 355 F. 2d 921	22
State v. *Kaufman*, 18 N.J. 75, 112 A. 2d 721	5
Stearns Co. v. *United States*, 291 U.S. 54	17
St. Pierre v. *United States*, 319 U.S. 41	9, 18
Turberville v. *United States*, 303 F. 2d 411, certiorari denied, 370 U.S. 946	17
United States v. *Barash*, 365 F. 2d 395	7
United States v. *Berger*, 338 F. 2d 485, certiorari denied, 380 U.S. 923	20, 21
Unitee States v. *Bottone*, 365 F. 2d 389, certiorari denied, 385 U.S. 974	7
United States v. *Butenko*, 384 F. 2d 554, certiorari granted, 392 U.S. 923	6
United States v. *Chow*, 398 F. 2d 596	20
United States v. *Cottage*, 354 F. 2d 975, certiorari denied, 383 U.S. 969	6
United States v. *Gainey*, 380 U.S. 63	4, 6
United States v. *Galante*, 298 F. 2d 72	18
United States v. *Goldberg*, 401 F. 2d 644, certiorari denied, February 24, 1969, No. 1027 Misc., this Term	6
United States v. *Gonzalez*, 379 F. 2d 284	18
United States v. *Guido*, 200 F. 2d 105	7
United States v. *Hines*, 256 F. 2d 561	7
United States v. *Izzi*, 385 F. 2d 412	6
United States v. *Johnson*, 319 U.S. 503	5
United States v. *Lothridge*, 402 F. 2d 454, certiorari denied, 393 U.S. 843	6, 21
United States v. *Mont*, 306 F. 2d 412, certiorari denied, 371 U.S. 935	7
United States v. *Morgan*, 346 U.S. 502	9
United States v. *National Plastikwear Fashions, Inc.*, 368 F. 2d 845, certiorari denied *sub nom. Greene* v. *United States*, 386 U.S. 976	18
United States v. *Romano*, 382 U.S. 136	5
United States v. *Sheridan*, 329 U.S. 379	5

Cases—Continued Page

United States v. *Thomas*, 303 F. 2d 561 6
United States v. *Trenton Potteries*, 273 U.S. 392 ..... 5, 7
United States v. *Wechsler*, 392 F. 2d 344, certiorari denied, 392 U.S. 932 6
Vela v. *United States*, 292 F. 2d 266 22
White v. *United States*, 330 F. 2d 811, certiorari denied, 379 U.S. 885 6
Whitfield v. *Ohio*, 297 U.S. 431 4
Wilson v. *United States*, 369 F. 2d 198 17
Yates v. *United States*, 355 U.S. 66 8
Yates v. *United States*, 356 U.S. 363 17
Yellin v. *United States*, 374 U.S. 109 ..... 5, 6

Statutes:
40 Stat. 1181 20
18 U.S.C. 4202 13
18 U.S.C. 4203 13
26 U.S.C. 7237 12
28 U.S.C. 2111 20
Md. code:
Art. 41, § 112 13
Art. 41, § 124 13
Art. 41, § 127 12
N.Y. Code Crim. Proc. § 393-c 9

Rules and regulations:
F.R. Crim. P.:
Rule 8(a) 15
Rule 32(c)(2) 16
Rule 52 20
28 C.F.R. 2.2 13
28 C.F.R. 2.3 13
28 C.F.R. 2.14 ..... 13, 14
28 C.F.R. 2.17 14

Miscellaneous:
Administrative Office of the U.S. Courts; the Presentence Investigation Report (1965) 14
Advisory Council on Parole of the National Council on Crime and Delinquency, *Guides for Parole Selection*, Chap. III (1963) 13, 14
1958 Annual Report of the Director of the Administrative Office of United States Courts 22

Miscellaneous—Continued

	Page
1968 Annual Report of the Director of the Administrative Office of the United States Courts	22
Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542 (1969)	23
Chappell, *The Lawyer's Role in the Administration of Probation and Parole*, 48 A.B.A. Jour. 742 (1962)	14
Comment, 6 Univ. of Fla. L. Rev. 560 (1953)	12
H. Rep. No. 913, 65th Cong., 3d Sess	20
Note, *Civil Disabilities of Felons*, 53 Va. L. Rev. 403 (1967)	9
Note, *Court Treatment of General Recidivist Statutes*, 48 Col. L. Rev. 238 (1948)	12
Note, 103 Univ. of Pa. L. Rev. 772 (1955)	23
Parole Evaluation Summary, United States Board of Parole Form H–1 (1968)	15
Richardson, *Parole and the Law*, 2 National Probation and Parole Association Journal 27 (1956)	14
1949 U.S. Code Cong. Service, pp. 1248, 1272	20
United States Probation Officer's Manual, §§ 6.15B, 622–6.24, 7.21 (1961)	14
5 Wharton, *Criminal Law and Procedure* § 2220 (12th ed. 1957)	12

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON, PETITIONER

v.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States on the following question:

> Does the "concurrent sentence doctrine," enunciated in *Hirabayashi* v. *United States,* 320 U.S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York,* 390 U.S. 629, 633, n. 2; *Peyton* v. *Rowe,* 391 U.S. 54; *Carafas* v. *LaVallee,* 391 U.S. 234, 237–238; and *Sibron* v. *New York,* 392 U.S. 40, 50–58?

Addressing ourselves to that issue, we elaborate our

view that the concurrent sentence doctrine has continuing validity.[1]

We show, first, that the concurrent sentence doctrine is firmly established in federal courts, including this Court, as a principle of judicial efficiency which permits a reviewing court to avoid decision of questions which can have no practical effect on the outcome of a case before it, and that therefore the doctrine has not been applied where collateral legal consequences are found, or there is reason to believe the verdict or sentence on the good counts might have been affected. We next show that such consequences rarely result from concurrent sentences on unreviewed counts; in general, any consequences spring from the fact of conviction and not the number of counts on which conviction is had. Under the concurrent sentence doctrine, unlike the mootness doctrine generally, review is never denied to the conviction as a whole, or to arguments that an error reaches all counts. Thus, we contend that, as in cases of harmless error generally, the appellant should bear the burden of showing how a claimed legal error, infecting less than all counts on which he has been convicted, will, if uncorrected, add to the legal consequences he will suffer from the conviction as a whole. Finally, we show the importance of the doc-

[1] In this discussion, we make no special reference to the particular facts or disposition appropriate in this case. However, it follows from our view that the doctrine is only one of judicial convenience and sound administration that the doctrine is not a bar to this Court's consideration of both counts involved in this case, should it find reason to reach both.

trine, as it is now applied, to the efficient operation of the already overloaded courts of appeal.

Accordingly, we conclude that the test announced in *Sibron* v. *New York,* 392 U.S. 40, 57—that collateral consequences are to be presumed in the absence of proof to the contrary—is inappropriate as applied to the concurrent sentence doctrine, and that while courts of appeals and this Court may consider all claims of error in particular cases, they should be required to do so only if a collateral legal consequence is shown.

A. THE HISTORY AND PRESENT APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE REVEAL IT AS A PRINCIPLE OF JUDICIAL EFFICIENCY WHICH PERMITS JUDGES TO AVOID DECISION OF ISSUES WHICH HAVE NO IMPACT ON THE RIGHTS OF ANY PARTY

The challenged practice of partial review of multiple count convictions first appeared in this Court in cases where the accused was charged on several counts, but given only a single, general sentence. Thus, Chief Justice Marshall wrote for this Court in 1813, in a forfeiture case charging violation of the customs laws, that a finding that one count is good "renders it unnecessary to decide on the others." *Locke* v. *United States,* 7 Cranch 339, 344; see, also, *Clifton* v. *United States,* 4 How. 242, 250; *Snyder* v. *United States,* 112 U.S. 216, 217. In *Claassen* v. *United States,* 142 U.S. 140, a criminal case in which a general sentence had been imposed after the defendant was convicted of five counts of embezzlement, the Court upheld one count and continued—

> This count and the verdict of guilty returned upon it being sufficient to support the judgment

> and sentence; the question of the sufficiency of the other counts need not be considered.
>
> In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is "that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad." *Peake* v. *Oldham*, Cowper, 275, 276; *Rex* v. *Benfield*, 2 Bur. 980, 985. See also *Grant* v. *Astle*, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. [At 146–147]

The rule thus recognized has been consistently reaffirmed by this Court.[2]

Where a defendant convicted on several counts has received separate, concurrent sentences, rather than a single, general sentence within the maximum imposable for a single count, there is even more reason for limiting review to one of the counts. With respect to a

---

[2] *United States* v. *Gainey*, 380 U.S. 63, 65 (the "concurrent sentences" alluded to were actually a single general sentence, see Transcript of Record, pp. 48–50, No. 13, October Term, 1964); *Barenblatt* v. *United States*, 360 U.S. 109, 115; *Sacher* v. *United States*, 356 U.S. 576, 579; *Emspak* v. *United States*, 349 U.S. 190, 195, n. 9; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, n. 1; *Whitfield* v. *Ohio*, 297 U.S. 431, 438; *Sinclair* v. *United States*, 279 U.S. 263, 299; *Abrams* v. *United States*, 250 U.S. 616, 619; *Goode* v. *United States*, 159 U.S. 663, 669; *Evans* v. *United States*, 153 U.S. 608, 609; *Evans* v. *United States*, 153 U.S. 584, 595.

general sentence the rule presumes that the trial court would have imposed the same sentence if the good count had stood alone. Where individual sentences are imposed to run concurrently for each count upon which a verdict of guilty was returned, there is no need to rely upon a presumption, for the trial court has indicated the penalty deemed appropriate for each count separately. This difference has led at least one state jurisdiction to recognize the possibility of limited review where concurrent sentences are imposed, although it rejects the *Claassen* presumption and requires review on all counts underlying a general sentence. See *State* v. *Kaufman,* 18 N.J. 75, 81, 112 A. 2d 721, 725. This Court has consistently been willing to limit its review to a single count sufficient to support the sentence where separate, concurrent sentences have been adjudged.[3] The doctrine has also

[3] *United States* v. *Romano*, 382 U.S. 136, 138; *Yellin* v. *United States*, 374 U.S. 109, 148 (dissenting opinion); *Lanza* v. *New York*, 370 U.S. 139, 151–152, n. 1 (concurring opinion); *Braden* v. *United States*, 365 U.S. 431, 433 n. 2, 450–451 n. 3 (dissenting opinion); *Greene* v. *United States*, 358 U.S. 326, 330; *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59 n. 6; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Pinkerton* v. *United States*, 328 U.S. 640, 642 n. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *United States* v. *Johnson*, 319 U.S. 503, 518; *Edwards* v. *United States*, 312 U.S. 473, 479, 483; *Gorin* v. *United States*, 312 U.S. 19, 32; *United States* v. *Trenton Potteries*, 273 U.S. 392, 402; *Brooks* v. *United States*, 267 U.S. 432, 441; *Pierce* v. *United States*, 252 U.S. 239, 252–253; *Debs* v. *United States*, 249 U.S. 211, 216.

received frequent application in all eleven federal circuits.[4]

The doctrine has not usually been considered mandatory, nor has it been applied in all cases. Although federal courts, including this Court, have sometimes stated that a conviction "must" be affirmed where there is a valid count carrying a concurrent sentence,[5] they have also stated that such convictions "may" be affirmed, or otherwise indicated that the doctrine is not obligatory.[6] The overwhelming majority of the

[4] Representative of recent courts of appeals decisions involving the doctrine are the following: *Saville* v. *United States*, 400 F. 2d 397, 399, 400 (C.A. 1), certiorari pending, No. 1045 Misc. this Term; *United States* v. *Goldberg*, 401 F. 2d 644, 647 (C.A. 2), certiorari denied, February 24, 1969, No. 1027 Misc., this Term; *United States* v. *Butenko*, 384 F. 2d 554, 565 (C.A. 3), certiorari granted, 392 U.S. 923, No. 197, this Term; *United States* v. *Wechsler*, 392 F. 2d 344, 348 (C.A. 4), certiorari denied, 392 U.S. 932; *Smith* v. *United States*, 403 F. 2d 689, 691, n. 4 (C.A. 5); *United States* v. *Lothridge*, 402 F. 2d 454 (C.A. 6), certiorari denied, 393 U.S. 843; *United States* v. *Izzi*, 385 F. 2d 412, 413 (C.A. 7); *Jacobs* v. *United States*, 395 F. 2d 469, 473 (C.A. 8); *Pasterchik* v. *United States*, 400 F. 2d 696, 702 (C.A. 9); *Galbraith* v. *United States*, 387 F. 2d 617, 619 (C.A. 10), but see *Sciberras* v. *United States*, 404 F. 2d 247 (C.A. 10); *Baker* v. *United States*, 401 F. 2d 958, 986 (C.A. D.C.).

[5] *United States* v. *Gainey*, 380 U.S. 63, 65; *Yellin* v. *United States*, 374 U.S. 109, 148 (dissenting opinion); *Davis* v. *United States*, 385 F. 2d 919, 921 (C.A. 5); *United States* v. *Thomas*, 303 F. 2d 561, 562 (C.A. 6); *White* v. *United States*, 330 F. 2d 811, 812 (C.A. 8), certiorari denied, 379 U.S. 885; *Garcia* v. *United States*, 373 F. 2d 806, 807 (C.A. 10); *Fabianich* v. *United States*, 302 F. 2d 904 (C.A.D.C.), certiorari denied, 371 U.S. 816; see *Braden* v. *United States*, 365 U.S. 431, 450–451 n. 3 (dissenting opinion).

[6] *Roviaro* v. *United States*, 353 U.S. 53, 59 n. 6; *Greene* v. *United States*, 358 U.S. 326, 330; *United States* v. *Cottage*, 354 F. 2d 975, 976–977 (C.A. 6), certiorari denied, 383 U.S. 969; *Galbraith* v. *United States*, 387 F. 2d 617, 619 (C.A. 10); *Aron* v. *United States*, 382 F. 2d 965, 972 n. 2 (C.A. 8); *Smith* v. *United States*, 335 F. 2d 270, 272 n. 2 (C.A.D.C.).

cases simply state, in effect, that it is "unnecessary" to reach alleged errors relating to less than all counts carrying concurrent sentences. E.g., *Hirabayashi* v. *United States*, 320 U.S. 81, 105. Moreover, the courts of appeals have indicated that they will review all counts, and reverse when necessary, where it appears that the alleged error might also have affected the verdict on the good counts (*United States* v. *Barash*, 365 F. 2d 395, 399, 403 (C.A. 2); *Smith* v. *United States*, 335 F. 2d 270, 271–272 (C.A.D.C.); see *Saville* v. *United States*, 400 F. 2d 397, 399, 400 (C.A. 1) (majority and concurring opinions); *Chavez* v. *United States*, 387 F. 2d 937; 939 (C.A. 9); *United States* v. *Mont*, 306 F. 2d 412, 414 (C.A. 2), certiorari denied, 371 U.S. 935; *United States* v. *Guido*, 200 F. 2d 105, 106 (C.A. 2)), or where there is reason to doubt that the sentence on the valid counts would otherwise have been the same (*United States* v. *Hines*, 256 F. 2d 561 (C.A. 2); *Robinson* v. *United States*, 30 F. 2d 25, 29 (C.A. 6); see *Saville* v. *United States*, *supra*, 400 F. 2d at 399; *United States* v. *Bottone*, 365 F. 2d 389, 394 (C.A. 2), certiorari denied, 385 U.S. 974), or where collateral penalties will be occasioned as a result of the conviction on the bad count (see *United States* v. *Hines*, *supra*; *Clark* v. *United States*, 267 F. 2d 99, 101–102, (C.A. 4)).

This Court has taken a similar view. Thus in *United States* v. *Trenton Potteries*, 273 U.S. 392, at 402, it was observed that nothing in the record suggested that the verdict on the good count was influenced by evidence on the other count; "[i]n these

circumstances" the judgment was sustained. In a few other cases, this Court reached all counts although concurrent or general sentences were imposed; it reversed on the bad counts, and remanded the case for resentencing where it appeared appropriate under the circumstances. *Yates* v. *United States*, 355 U.S. 66, 75-76 (concurrent sentences); *Nilva* v. *United States*, 352 U.S. 385, 396 (general sentence); *Ballew* v. *United States*, 160 U.S. 187, 197–203 (general sentence).[1]

B. SINCE FAILURE TO REVIEW ALL OF SEVERAL CONCURRENT SENTENCES ONLY RARELY WOULD CONDONE COLLATERAL LEGAL CONSEQUENCES, THE BURDEN MAY FAIRLY BE PLACED ON AN APPELLANT TO SHOW THAT THE CONCURRENT SENTENCE DOCTRINE SHOULD NOT BE APPLIED TO HIS APPEAL

1. IN THE ORDINARY CASE, INDIVIDUAL COUNTS ON WHICH CONCURRENT SENTENCES ARE IMPOSED CARRY NO INDIVIDUAL LEGAL CONSEQUENCES WHICH MIGHT REQUIRE THE VALIDITY OF CONVICTION ON EACH COUNT TO BE TESTED

In *Sibron* v. *New York*, 392 U.S. 40, 50–58; *Carafas* v. *LaVallee*, 391 U.S. 234, 237–238; *Peyton* v. *Rowe*, 391 U.S. 54; and *Ginsberg* v. *New York*, 390 U.S. 629, 633–634 n. 2, this Court recognized the existence of several secondary penalties or disabilities which, under state and federal laws, could be imposed upon a defendant as collateral consequences of a criminal conviction, and which thereby prevented the dismissal of such cases as moot or premature. Among the collat-

[1] In *Putnam* v. *United States*, 162 U.S. 687, 714–715 (concurrent sentences), this Court reviewed both counts, affirmed both judgment and sentence as to one and remanded for further proceedings on the other.

eral consequences thus recognized are the inability to engage in certain businesses or occupations, preclusion from holding public office, disenfranchisement, ineligibility for jury service, subjection to possible deportation in the case of certain aliens, statutorily authorized impeachment of character at a future trial,[8] and the amalgamation of consecutive sentences for parole and other custodial purposes. *Sibron* v. *New York, supra,* 392 U.S. at 53–56; *Carafas* v. *LaVallee, supra,* 391 U.S. at 237–238; *Peyton* v. *Rowe, supra,* 391 U.S. at 64 and n. 3; *Ginsberg* v. *New York, supra,* 390 U.S. at 633–634 n. 2; *Jacobs* v. *United States,* 388 U.S. 431, 435, 438 (dissenting opinions); *United States* v. *Morgan,* 346 U.S. 502, 513; *Fiswick* v. *United States,* 329 U.S. 211, 221–222; see generally Note, *Civil Disabilities of Felons,* 53 Va. L. Rev. 403 (1967). These are significant reasons for precluding the automatic loss of a right to appeal the propriety of criminal conviction.

Such consequences do not, however, normally flow from the failure to review (and possibly reverse) less than all of a series of related convictions on which concurrent sentences have been imposed. The concurrent sentence doctrine cannot be used to fore-

[8] In *Sibron* it was emphasized that there was a clear distinction between a general impairment of credibility, which was found not to constitute a legal disability in *St. Pierre* v. *United States,* 319 U.S. 41, 43, and a "specific statutory authorization for use of the conviction to impeach the 'character' of a defendant in a criminal proceeding." Such a statutory authorization in the petitioner's home state (N.Y. Code Crim. Proc. § 393–c) was found to constitute a "clear legal disability deliberately and specifically imposed by the legislature." 392 U.S. at 56 n. 17.

close review of a question common to all counts of a challenged conviction. Nor is it applied to foreclose direct review of a conviction resulting from one trial because of a concurrent sentence imposed in another. Thus, unlike mootness cases generally, the doctrine never serves to foreclose direct appeal from a conviction.[9] Since collateral disabilities generally flow from the fact of trial and conviction, rather than any one count or the number of counts on which conviction is had, failure to review a particular count is unlikely to entail a prejudice to the accused which would otherwise be corrected. And the exceptional cases are already well-recognized as occasions when the concurrent sentence doctrine should not be applied.

Thus, impeachment is not usually facilitated by the existence of a multiple count conviction. The concurrent sentence doctrine may frequently be applied, for example, in cases of mail fraud or counterfeiting, where each mailing or utterance is a separate

[9] For this reason, there is also less basis for concern that policies favoring prompt resolution of challenges to convictions will be frustrated. In the mootness and habeas corpus cases, this Court has been concerned at the real possibility that a present denial of relief may serve only to postpone the appellate challenge to a later date, when evidence on both sides of the issues will be stale. *E.g.*, *Sibron* v. *New York*, *supra*, 392 U.S. at 56–57; *Peyton* v. *Rowe*, *supra*, 391 U.S. at 64. This possibility is far more remote in the concurrent sentencing doctrine context. The initial affirmance on appeal will have meant that any challenges common to all counts have been found lacking in merit, and in addition that one of the several counts has been found independently valid. Any subsequent petition for collateral relief would have to establish error in these appellate conclusions before the question of error in the unreviewed counts would become relevant.

offense but the gist of the crime is the fraudulent scheme or counterfeiting activity. The impeachment "value" of conviction for such crimes lies in the fact of previous conviction, not in the number of counts that were then charged. Accordingly, a defendant previously convicted of mail fraud would be asked whether he is the person who was convicted of using the mails to defraud, not whether his conviction was in five or twenty-five counts.[10] In *Sibron,* 392 U.S. at 56, this Court pointed out that a material factor augmenting the potential impeaching effect of that conviction, as opposed to past convictions, was the recency of its occurrence; this factor has no relevance to the effect of concurrent sentences imposed at one time.

Similarly, concurrent sentences on several counts ordinarily make possible no greater enhancement of sentence on future conviction under federal or state recidivist statutes than an identical sentence on a single count. An allegedly moot sentence, fully served, may subject the offender to an increased penalty should he again commit an offense; counts left unreviewed because of the concurrent sentence doctrine have no such independent effect. Most recidivist statutes turn on the fact that after sentencing, for one or many crimes, a defendant then commits another offense. See Note, *Court Treatment of General*

[10] Conceivably, a prosecutor might try to show that a defendant was convicted at one trial of two separate, related crimes, such as separate bank robberies, only one of which was reviewed. For such a remote eventuality, it is more appropriate to hold that only the reviewed count can be the basis of impeachment than to do away with the concurrent sentence rule.

Recidivist Statutes, 48 Col. L. Rev. 238, 240, 242, 244 (1948); Comment, 6 Univ. of Fla. L. Rev. 560, 561 (1953); 5 Wharton, *Criminal Law and Procedure,* § 2220 at 440 (12th ed. 1957). Under the federal narcotics statutes, for example, 26 U.S.C. 7237, an offense is not considered subsequent for purposes of the statute unless it follows the conviction for the preceding offense. *E.g., Gonzalez* v. *United States,* 224 F. 2d 431 (C.A. 1), certiorari denied, 356 U.S. 913. This fully accords with the policy of the statutes to mete out more severe penalties to persons who have not been dissuaded from criminal activity by previous legal encounters. Convictions which do not affect the number of times a person is imprisoned would not subject a defendant to the hazard of an increased penalty for a subsequent offense.

Petitioner suggests that the number of counts upon which a defendant receives concurrent sentences is a factor in determining parole eligibility, and that application of the concurrent sentence doctrine would leave this collateral legal consequence untested (Pet. Supp. Br., pp. 8–9). But there is no such legal effect under federal law or practice.[11] A federal prisoner serving a specified term or terms "may be released on parole after serving one-third of such term or terms".

[11] Whether such a legal consequence exists under Maryland law is a matter outside our interest in this case. We note, however, that the statute petitioner cites, Md. Code Art. 41, § 127, calls for an abstract of each "*case* tried" in which guilt is found; there is nothing to show that this does not equally include abstracts of particular counts on which an applicant for parole may have been found not guilty. Moreover, the standards the Maryland Board is directed to apply in determining release, as in the federal system, emphasize readiness for release, and make

18 U.S.C. 4202; 28 C.F.R. 2.3. While consecutive sentences are aggregated in assessing the total term being served, concurrent sentences of course are not, and hence the number of concurrent sentences imposed has no bearing on the date a prisoner will become eligible for parole under the statute. *Clark* v. *United States*, 267 F. 2d 99, 102 (C.A. 4); see *Brown* v. *United States*, 256 F. 2d 151, 152 (C.A. 5). Nor is the decision of the Board of Parole as to whether an eligible prisoner should be released dependent upon the number of counts affirmed on appeal. Under 18 U.S.C. 4203, if it appears to the Board "that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole". See also 28 C.F.R. 2.2.

There is no basis for supposing that the concurrent senfence rule has any practical effect upon the Board's consideration of release authorizations. The Board is required to consider "all available relevant and pertinent information concerning the case" (28 C.F.R. 2.14), not just conduct of the prisoner culminating in affirmed criminal convictions. This information in-

---

no mention of the number of counts being served. *Id.* at Art. 41, §§ 112, 124. State boards of parole generally are advised and authorized to consider all circumstances connected with the offense for which the defendant is imprisoned, as well as all the facts concerning prior criminal charges whether or not convictions resulted. See generally, Advisory Council on Parole of the National Council on Crime and Delinquency, *Guides for Parole Selection*, Chap. III (1963).

cludes the presentence report, which contains a history of the prisoner's previous involvements with state and federal law enforcement agencies whether or not such matters resulted in criminal trials or convictions. 28 C.F.R. 2.14, 2.17; United States Probation Officer's Manual, §§ 6.15B; 6.22–6.24, 7.21 (1961). Background information concerning the immediate case is obtained from various sources, including the government attorney who handled the prosecution. Richardson, *Parole and the Law,* 2 National Probation and Parole Association Journal 27, 30 (1956); 28 C.F.R. 2.14. All aggravating and mitigating circumstances surrounding the acts leading to the prisoner's conviction are considered. *Richardson, supra;* Chappell, *The Lawyer's Role in the Administration of Probation and Parole,* 48 A.B.A. Jour. 742, 745 (1962);[12] Parole Evaluation Summary, United States Board of Parole Form H–1, p. 2 (1968); Administrative Office of the U.S. Courts, *The Presentence Investigative Report,* pp. 9–12, 30–32 (1965).

An indication of the inclination of parole boards to look behind the ultimate legal disposition of a criminal case appears in one widely-disseminated book of guidelines which notes: "the record of an arrest for felonious assault which was nol-prossed can be quite misleading; a violent offense may have been committed and for various reasons trial was not feasible, or else the charge may have been false. The facts are important in considering parolability." Advisory Council on Parole of the National Council on Crime

[12] Both Mr. Richardson and Mr. Chappell, at the time of writing the respective articles, held the office of Chairman of the United States Board of Parole.

and Delinquency, *Guides for Parole Selection,* 39–40 (1963). Thus, the entire panorama underlying the charges, not just the limited evidence in support of the convictions, is before the Board in making its evaluation of the prisoner's character. Since it is the whole man the Board members are evaluating, and since they must consider all relevant and pertinent information whatever the extent of its ultimate judicial confirmation, an appellate reversal on one or more related counts could have no real impact on their assessment of the prisoner's readiness for release.

Finally, in the usual case, there is no proper basis for concern that trial of the unreviewed counts together with the reviewed count may have affected the conviction and/or sentence imposed on the latter. Where a trial error is so grave as to infect all counts on which conviction is had, counsel will doubtless urge that the error is applicable to all counts and obtain review of the whole case in that respect. In such instances, invocation of the concurrent sentence doctrine is of course inappropriate. So, also, there are special circumstances which suggest independent review of all counts, despite concurrent sentences, because reversal on one or more of the charges will justify a remand for resentencing in light of doubts whether a lesser sentence might have been imposed if the surviving count or counts had stood alone. But such rare exceptions do not invalidate the concurrent sentence rule for most cases.[13]

[13] Under F.R. Crim. P. 8(a), joinder of offenses for trial is possible only if the offenses charged "are of the same or similar character or are based on the same act or transaction or on

There is normally no reason to believe the sentence imposed on any particular count was affected by a vulnerable conviction on another count. Sentences are imposed in light of "any prior criminal record of the defendant and * * * information about his characteristics, his financial condition and the circumstances affecting his behavior * * *," Fed. R. Crim. P. 32(c)(2). Since the trial judge is thus authorized to consider an accused's contemporaneous conduct without regard to whether it resulted in concurrent charges or convictions, the reversal of individual counts will not usually influence his sentencing choice. Indeed, when a judge imposes a general sentence or concurrent sentences rather than consecutive sentences, he in effect is indicating that he has made such a determination. At all events, in the case of concurrent sentences, the trial judge must be taken to be ruling that the penalty imposed is appropriate as to each

---

two or more acts or transactions connected together or constituting parts of a common scheme or plan." Where several charges are brought on account of one transaction, for example, under the coordinate statutes governing narcotics offenses, or on account of one scheme, as in mail fraud prosecutions, the chance of prejudice to conviction or sentence on good counts by bad is particularly slight. The first category mentioned in the rule, joinder of offenses of the same or similar character, may be more problematic. The apparent circumstances of one robbery may be more aggravated than a second charged in the same indictment; a jury might be influenced in its assessment of guilt on the second by conclusions regarding character it reached in considering the first. But in such cases, separate trials are more likely than in the narcotics or mail fraud type of offense. Thus, even here, we believe the question of influence is one appropriate to be determined in each case where it arises; foreclosing use of the concurrent sentence doctrine would not be justified.

count—taking into account all the information available to him, but without regard to the defendant's valid conviction on other counts. And, of course, unless the record suggests otherwise, the presumption must be that the trial judge discharged his official responsibility properly. See *Wilson* v. *United States,* 369 F. 2d 198, 200 (C.A.D.C.); *Ferrari* v. *United States,* 169 F. 2d 353 (C.A. 9); *Turberville* v. *United States,* 303 F. 2d 411, 417 (C.A.D.C.) certiorari denied, 370 U.S. 946; *Stearns Co.* v. *United States,* 291 U.S. 54, 63.

Yates v. *United States, supra,* in which this Court did affirm one count but reversed as to the remainder and remanded the case for resentencing, is an example of the exceptional case. The petitioner there was charged with eleven specifications of contempt; this Court determined that properly there should have been only one specification and reversed as to the remainder. Because too many crimes had been charged, the Court vacated the sentence on the one good specification and remanded for resentencing. Nonetheless, the trial court reinstated its original sentence, and this Court was required to correct the sentence under its unique power to do so in criminal contempt cases. *Yates* v. *United States,* 356 U.S. 363. Thus, *Yates* affords no proper basis for concluding that in concurrent sentence cases generally the sentence on a valid count would have differed had the trial judge realized that the conviction on some other count was infected with error. Rather one must conclude, an additional "concurrent sentence * * * adds nothing to

their punishment." *Pierce* v. *United States,* 252 U.S. 239, 252–253.

In short, in the great majority of cases, no collateral legal consequences follow from the failure of the courts to review counts which do not affect a sentence imposed as the result of a single trial. Certainly, any additional social stigma that may be attributable to the conviction on a greater number of counts—factually, a doubtful proposition—is not sufficient to warrant appellate scrutiny. *United States* v. *Gonzalez,* 379 F. 2d 284, 285 (C.A. 2); see *St. Pierre* v. *United States,* 319 U.S. 41, 43; *United States* v. *National Plastikwear Fashions, Inc.,* 368 F. 2d 845, 846 (C.A. 2), certiorari denied *sub nom. Greene* v. *United States,* 386 U.S. 976; *United States* v. *Galante,* 298 F. 2d 72, 73 (C.A. 2). It follows, we submit, that the considerations which justify review of a conviction in cases allegedly moot or premature do not normally apply to the individual counts of a conviction as to which review has been denied through use of the concurrent sentence doctrine.

2. APPELLANTS SHOULD BEAR THE BURDEN OF SHOWING THE CIRCUMSTANCES, IF ANY, WHICH BAR APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE TO THEIR APPEALS

In *Sibron* v. *New York, supra,* this Court placed upon the proponents of mootness the burden of showing that "there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57. But this burden was imposed on the presumption that such consequences usually exist, as well as for reasons of justice and economy of judicial effort. As shown above,

neither the consequences nor the reasons are ordinarily applicable to cases in which the concurrent sentence doctrine might be applied, and the courts in applying the doctrine have been sensitive to the extraordinary case where they do occur. Thus, while harm may properly be presumed if no review at all should be granted a case, the presumption is improper where review is granted on some but not all counts carrying concurrent sentences.

Although it could hardly be denied that the constitutional requisites of standing and justiciability are met in cases subject to the concurrent sentence doctrine, see generally the discussion in *Flast* v. *Cohen*, 392 U.S. 83, 94–101, it does not follow that appellate courts should be obliged to review all claims of error made to them, including those which could confer no legal benefit on the appellant even if decided in his favor. This Court regularly follows the practice of not passing upon all arguments a party presents, if it determines that he must win or lose upon one. If review of the additional claims could lead to no different outcome or afford no relief, it would raise many of the risks inherent in advisory opinions; the "impact of actuality" and immediacy of injury ordinarily insisted upon for review not only influence the manner in which appellants present their claims, but also give impetus to the considered judicial evaluation of an issue. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346–348 (concurring opinion).

In our view, the concurrent sentence doctrine should thus be viewed as one application of the harmless error rule, which *requires* appellate courts to "give

judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111; see also Rule 52, F.R. Crim. P.[14] No reason has been shown to make an exception here to the usual rule that an appellant must demonstrate that he has been harmed by the errors he alleges. Congress noted in enacting the predecessor of the current harmless error statute governing appeals (28 U.S.C. 2111) that "[t]he object of the * * * [statute] is to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights." H. Rep. No. 913, 65th Cong., 3d Sess., 1919; see 40 Stat. 1181; 1949 U.S. Code Cong. Service, pp. 1248, 1272. This is the recognized burden of appellants (*e.g., Palmer* v. *Hoffman,* 318 U.S. 109, 116; *Morgan* v. *United States,* 98 F. 2d 473, 477 (C.A. 8), certiorari denied, 305 U.S. 648), and there is nothing inherent in the nature or effect of the concurrent sentence doctrine to warrant a departure from that requirement.

C. AN ABANDONMENT OF THE CONCURRENT SENTENCE DOCTRINE WOULD UNNECESSARILY BURDEN THE ADMINISTRATION OF JUSTICE

Use of the concurrent sentence doctrines contributes

[14] Indeed, reviewing courts have sometimes stated directly that errors reaching less than all counts on which concurrent sentences have been imposed were "harmless." *United States* v. *Chow,* 398 F. 2d 596, 597 (C.A. 2); *Head* v. *United States,* 346 F. 2d 194, 196 (C.A. 9); *United States* v. *Berger,* 338 F. 2d 485, 488 (C.A. 2), certiorari denied, 380 U.S. 923.

substantially to judicial efficiency, by excusing appellate judges, who may otherwise have no choice as to the issues they must decide on an appeal, from the necessity of considering grounds of appeal which could not affect the legal outcome of the case. A study of the federal criminal cases filed in this Court during the current Term indicates the potential importance of this consideration. Convictions on multiple counts carrying concurrent sentences occurred in approximately 45 percent of the cases studied; the average number of counts in these cases was four.[15] Since a multiplicity of counts probably discourages appeal by making the chance for ultimate success appear less, the corresponding figures in the courts of appeals are probably at least as great. Invocation of the doctrine is possible whenever convictions on particular counts are challenged on grounds peculiar to themselves; such invocation may make it unnecessary to resort to a lengthy record to ascertain the sufficiency of the evidence on particular counts (*e.g., United States* v. *Berger,* 338 F. 2d 485, 488 (C.A. 2), certiorari denied, 380 U.S. 923), or, if conviction on one or more counts is wholly unchallenged, to write an opinion (*e.g., United States* v. *Lothridge,* 402 F. 2d 454 (C.A. 6);

[15] The criminal cases examined are those in which the government filed responses to petitions or appeals through February 14, 1969. There were 312 such cases. In 29, the exact nature of the sentence was not clear from the records available in the Department of Justice. Concurrent sentences were imposed in 126 of the remaining 283 cases. The number of counts upon which concurrent sentences were imposed ranged from 2 to 21.

Banzer v. *United States*, 367 F. 2d 865 (C.A. 9), certiorari denied, 385 U.S. 1009; *Spencer* v. *United States*, 355 F. 2d 921 (C.A. 9); *Vela* v. *United States*, 292 F. 2d 266 (C.A. 5)). Application of the doctrine in such cases serves to free the appellate courts to concentrate their limited time and energies upon those cases in which their decisions could afford the appellant practical relief.

In view of the swelling criminal caseload in the court of appeals, such conservation of judicial resources is becoming increasingly important. In the past ten years, the number of direct appeals from criminal convictions has risen by a factor of three and one half, from 599 to 2098; there are over two and one half times as many appeals from unsuccessful collateral attacks[16] by federal prisoners, 498 as opposed to 175; and the number of appeals from unsuccessful collateral attacks by state prisoners has risen from 77 to 1235, a factor of sixteen.[17] *1958 Annual Report of the Director of the Administrative Office of United States Courts* 148, 156; *1968 Annual Report of the Director of the Administrative Office of the United States Courts* 186–188. During this same period, the total number of judges on the courts of appeals has risen from 64 to 83, an increase of about one-third. *1958 Annual Report, supra,* at 143; *1968 Annual Report, supra,* at 90. The problems occasioned

[16] The concurrent sentence doctrine is, of course, as applicable to collateral attacks as it is to direct appeals.

[17] These figures represent the total number of such cases filed in the several circuits during the fiscal years ending on June 30, 1958, and June 30, 1968.

by this burgeoning workload are generating serious concern. See generally, Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L. Rev. 542 (1969). The concurrent sentence doctrine, together with other principles of restraint operating upon the appellate courts in the exercise of their power, must, as a practical matter, be recognized as having an impact in limiting the effect of this inundation. See Note, 103 Univ. of Pa. L. Rev. 772, 775 (1955). The abandonment of the doctrine could significantly aggravate the problem without affording any practical relief to the appellants involved.

For the foregoing reasons, it is respectfully submitted that this Court should hold that the concurrent sentence doctrine may be applied in the absence of any demonstration by a defendant that he will be subjected to a legal detriment if it is applied to his case.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 14 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S REPLY BRIEF

H. THOMAS SISK
LAURENCE LEVITAN
M. MICHAEL CRAMER
PAUL H. WEINSTEIN
Counsel for Petitioner
358 Hungerford Court
Rockville, Maryland 20850